No. 03-917

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RONALD CLEVELAND, D/B/A LONE STAR VIDEOTRONICS; PHOENIX-MERCHANT INVESTMENTS INC., D/B/A 49ER VIDEO; THE BIG PICTURE VIDEO INC.,

Petitioners,

v.

VIACOM INC.; PARAMOUNT HOME VIDEO INC.; BUENA VISTA HOME ENTERTAINMENT INC.; COLUMBIA TRI-STAR HOME VIDEO INC.; UNIVERSAL STUDIOS HOME VIDEO INC.; TWENTIETH CENTURY FOX HOME ENTERTAINMENT INC.; BLOCKBUSTER INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant a writ of certiorari in this antitrust conspiracy case to review the Fifth Circuit's unpublished decision affirming judgment as a matter of law for respondents based on the Fifth Circuit's application of the well-settled standard set forth in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), to petitioners' circumstantial evidence of conspiracy, resulting in an opinion that is entirely in accord with the decisions of other circuits in similar cases.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents advise the Court that the following is a list of their corporate parents and the publicly traded companies that own 10% or more of any of them:

Viacom Inc.

Paramount Pictures

Fox Entertainment Group Inc.

Disney Enterprises, Inc.

Sony Pictures Entertainment

Universal Home Video LLC

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
EXPLANATION OF RECORD CITATIONS	vii
STATEMENT	3
Factual Background	3
Proceedings Below	7
REASONS TO DENY THE WRIT	9
I. The Fifth Circuit Correctly Applied This Court's Summary Adjudication Standard For Antitrust Conspiracy Claims.	9
A. This Court's decisions restrict the range of permissible inferences in antitrust cases.	9
B. The Fifth Circuit correctly held that petitioners failed to produce evidence that "tends to exclude the possibility of independent conduct.	12
1. The evidence of "business justification"	15

Contents

Page

2. Petitioners' so-called "controverting" evidence 17

3. The Fifth Circuit's decision 19

II. There Is No Conflict Among The Circuits Regarding Summary Adjudication Of Antitrust Conspiracy Claims Based On Circumstantial Evidence. 22

CONCLUSION 27

TABLE OF CITED AUTHORITIES

Page

CASES

Aguilar v. Atlantic Richfield Co.,
24 P.3d 493 (Cal. 2001) 10, 11

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 11

In re Baby Food Antitrust Litig.,
166 F.3d 112 (3d Cir. 1999) 17, 19, 23

In re Brand Name Prescription Drugs Antitrust Litig.,
123 F.3d 599 (7th Cir. 1997) 24, 25

City of Tuscaloosa v. Harcros Chemicals, Inc.,
158 F.3d 548 (11th Cir. 1998) 25

Eastman Kodak Co. v. Image Technical Servs., Inc.,
504 U.S. 451 (1992) 20, 22, 26

F.T.C. v. Morton Salt,
334 U.S. 37 (1948) 12

InterVest, Inc. v. Bloomberg, L.P.,
340 F.3d 144 (3d Cir. 2003) 23

Market Force Inc. v. Wauwatosa Realty Co.,
906 F.2d 1167 (7th Cir. 1990) 25

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) ..... *passim*

Cited Authorities

Page

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 20-21

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984) 9, 10

Paul Kadair, Inc. v. Sony Corp. of Am.,
694 F.2d 1017 (5th Cir. 1983) 13

Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co.,
998 F.2d 1224 (3d Cir. 1993) 23

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000) 20, 21

Re/Max Int'l, Inc. v. Realty One, Inc.,
173 F.3d 995 (6th Cir. 1999) 23, 24

Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.,
971 F.2d 37 (7th Cir. 1992) 25

Royal Drug. Co. v. Group Life & Health Ins. Co.,
737 F.2d 1433 (5th Cir. 1984) 13

Serfecz v. Jewel Food Stores,
67 F.3d 591 (7th Cir. 1995) 25

Todorov v. DCH Healthcare Auth.,
921 F.2d 1438 (11th Cir. 1991) 26

Williamson Oil Co. v. Philip Morris USA,
346 F.3d 1287 (11th Cir. 2003) 12, 25, 26

Cited Authorities

Page

RULES

5TH CIR. R. 47.5.1 21

5TH CIR. R. 47.5.4 21

SUP. CT. R. 10 12

EXPLANATION OF RECORD CITATIONS

"Pet." refers to the Petition for Writ of Certiorari.

"Pet. App." refers to the Appendix attached to the Petition for Writ of Certiorari.

"__R__" refers to the Record on Appeal cited by volume and page number.

"__RT__" refers to the Reporter's Transcript in the Record on Appeal (Volumes 28 – 37) cited by volume and page number.

"PX-__" refers to Plaintiffs' trial exhibits cited by exhibit number.

"DX-__" refers to Defendants' trial exhibits cited by exhibit number.

RESPONDENTS' BRIEF IN OPPOSITION

Petitioners brought this antitrust conspiracy case against Blockbuster Inc., Blockbuster's majority shareholder, Viacom Inc., and the home video units of the principal Hollywood movie studios (collectively, "studios")—Buena Vista Home Entertainment, Inc. ("Disney"), Columbia Tri-Star Home Video, Inc. ("Columbia"), Twentieth Century Fox Home Entertainment, Inc. ("Fox"), Universal Studios Home Video, Inc. ("Universal"), Warner Home Video ("Warner"), MGM Home Entertainment ("MGM"), and Paramount Home Video, Inc. ("Paramount"). This action arises out of Blockbuster's negotiation of separate VHS videocassette revenue-sharing agreements with each of these studios starting in 1997.

Petitioners allege that respondents engaged in a price-fixing conspiracy in violation of Section 1 of the Sherman Act. As their petition makes plain, petitioners' claim hinges on circumstantial evidence allegedly establishing that the studios engaged in consciously parallel conduct that was against their individual economic interests and therefore was more likely the result of illicit collusion than independent business judgments. In an unpublished opinion, the Fifth Circuit ruled that petitioners' circumstantial evidence was insufficient to survive respondents' motion for judgment as a matter of law. The court of appeals recognized, and petitioners do not dispute, that this Court's decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), furnishes the standard for determining whether petitioners' ambiguous circumstantial evidence raised a fact question for the jury to decide. Carefully applying the *Matsushita* standard, the Fifth Circuit correctly concluded that petitioners failed to produce evidence that "tended to exclude the possibility of independent conduct."

Petitioners claim, however, that the Fifth Circuit erred by treating as "dispositive" evidence that respondents' conduct was the result of independent, legitimate business decisions, thereby creating a "more restrictive standard for summary disposition

of antitrust cases which sharply diverges from the law in other circuits." Pet. at 12, 18-19.

In truth, the Fifth Circuit did not articulate a new standard for summary adjudication of antitrust conspiracy claims. The Fifth Circuit merely concluded that petitioners' evidence in this case did not tend to exclude legitimate explanations for respondents' conduct. In reaching this conclusion, the Fifth Circuit did not treat evidence of business justification as "dispositive" of the conspiracy question. Respondents' business justifications were "dispositive" only in the sense that the evidence petitioners offered did not sufficiently rebut them, entitling respondents to judgment as a matter of law. This conclusion flows directly from *Matsushita* and its progeny in the various courts of appeals, demonstrating that the circuit conflict petitioners attempt to manufacture does not exist.

Thus, the Fifth Circuit did not, as petitioners contend, "eliminate" the theory of conscious parallelism as an avenue of proof, it did not require that petitioners "disprove with 100 percent certainty defendants' proferred business justification," and it did not decide that "as a matter of law whenever a defendant proffers any business reason for its conduct, such evidence—even if contested by direct evidence—trumps evidence showing consciously parallel conduct against interest." Pet. at 13-14, 26. To the contrary, the Fifth Circuit vigilantly applied well-settled legal principles governing antitrust conspiracy claims based on circumstantial proof. Petitioners therefore present no issues that warrant this Court's review.[1]

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[1] Moreover, petitioners' request for review wholly depends on the premise that "the defendants' purported explanation for why their conduct should not be viewed as against their individual interests is controverted by direct evidence from third parties." Pet. at 18. Thus, to grant the requested writ of certiorari, this Court would have to review all of the evidence in the record to determine whether the evidence petitioners cite truly "contradicts" and "controverts" the evidence showing that defendants acted independently. As we explain below, petitioners'

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STATEMENT

Factual Background[2]

In 1997, the home video rental market was sagging. Rental transactions for all retailers were flat or declining.[3] For years, video rental retailers had operated under a model of "managed customer dissatisfaction" by buying a limited number of copies of new release titles to attract customers to the store and then steering customers to older, "library" titles when the store ran out of new releases.[4] As alternative forms of movie entertainment (such as DirecTV, pay-per-view, and the Internet) emerged, however, customers began walking out of video stores empty-handed and turning to other entertainment sources instead of renting library titles as their second choice.[5] For example, by 1997, a remarkable thirty percent of Blockbuster's customers were walking out of their local Blockbuster stores without a movie because Blockbuster had not stocked enough copies of new releases.[6]

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evidence actually supports, rather than contradicts, respondents' position. But more importantly, petitioners' request for review plainly rests on their disagreement with the Fifth Circuit's interpretation of the evidence, not on an asserted error of law.

[2] Petitioners' factual background section does not present a complete picture of the video rental industry and contains numerous "facts" unsupported by the record. Thus, respondents include this factual background to provide context for the Court. Respondents' arguments, however, treat petitioners' factual allegations in the light most favorable to them, as the standard for deciding Rule 50 motions requires.

[3] *See* 31RT1138-39, 1210; 32RT1627-28; 33RT1674; 37RT3153-54.

[4] *See* 29RT315, 474; 33RT1844-45; 37RT3147-48; PX-19 at 2.

[5] *See* PX-19 at 2-3; 37RT3154.

[6] *See* 37RT3148.

In the late 1980s, video distributors, led by Rentrak Corporation of Portland, Oregon, had begun offering retailers revenue-sharing terms as a way to address the increasing copy-depth problem in the industry, but not every retailer took advantage of the Rentrak option.[7]

Under revenue-sharing arrangements, studios lease tapes to retailers for lower "up-front" payments in return for a share (or "split") of a retailer's rental revenues.[8] Revenue sharing allows retailers to acquire more copies of titles to satisfy initially high consumer demand, while still providing a predictable revenue stream for the studios.[9] For video retailers, revenue sharing is a low-margin, high-volume model that depends on spending more on inventory, managing the increased inventory, spending more to advertise the increased inventory, and, most importantly of all, achieving a substantial increase, or "lift," in rental business to offset higher costs.[10]

There are generally two forms of revenue sharing in the video business—output and "cherry-pick." Under output revenue sharing, a retailer must acquire all movie titles a studio releases, regardless of the title's box office performance or popularity in the retailer's local markets.[11] In return for accepting the risk of an output obligation, retailers keep a higher percentage or "split" of the rental revenue. "Cherry-pick" revenue sharing allows a retailer to pick and choose the titles it will acquire; in exchange for this option, the retailer pays the studio a higher percentage of its rental revenue from the titles it chooses.

Under the leadership of its new CEO, John Antioco, Blockbuster began exploring revenue-sharing deals in 1997 as

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[7] *See* 29RT305.

[8] *See* 29RT332-33; 37RT3159-60.

[9] *See* 32RT1633; 37RT3159-60.

[10] *See* 29RT331-32; 37RT3159-60.

[11] *See* 29RT325-26, 331-32, 447-48; 36RT2802.

part of a new business model designed to satisfy customer demand and to improve customer experience in Blockbuster stores.[12] Blockbuster developed its new business model in response to increasing customer dissatisfaction and growing chain competition.[13]

Blockbuster, which recently had invested millions building its own 900,000-square-foot distribution center, determined it could administer its own revenue-sharing programs with the studios instead of using Rentrak.[14] After negotiations that spanned more than a year, Blockbuster reached separate revenue-sharing agreements with each of the studios. Although the agreements generally allowed Blockbuster to retain 55% to 65% and return to each studio 35% to 45% of rental revenue, the terms of each Blockbuster revenue-sharing contract varied in important and material respects.[15] Significantly, none of the agreements prohibited a studio from giving identical or even better revenue-sharing terms to other video retailers or distributors, and each defendant adamantly denies agreeing with Blockbuster or with any other defendant to refuse equivalent terms to petitioners.[16]

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[12] *See* 37RT3149-51; 29RT443-44. There were many facets to Blockbuster's new business model, but the primary components included a broader selection of titles and a larger number of videocassettes, attractive and conveniently-located stores, a renewed emphasis on customer service, competitive pricing and rental terms, a rejuvenated advertising and marketing strategy, and a growth strategy built on adding new company and franchise stores and acquiring existing stores. 37RT3082-86, 3150-51, 3183-84; PX-7 at 53-56.

[13] Blockbuster's principal competitor, Hollywood Video, used revenue sharing through Rentrak to increase its copy depth and compete more effectively against Blockbuster. *See* 30RT623; 37RT3140-42.

[14] *See* 37RT3177; 29RT305.

[15] *See* 37RT3100-01.

[16] *See* 37RT3162-64, 3199-3200; 29RT435-36; 31RT975-76, 1155; 32RT1634; 34RT2242, 2245; 36RT2672-73, 2678, 2687-88, 2811.

To secure the rental-revenue splits it negotiated, Blockbuster made expensive and risky commitments. The output aspect of the agreements requires Blockbuster to acquire virtually every one of the hundreds of movie titles released by the studios.[17] Each Blockbuster company store must participate in the revenue-sharing program, regardless of whether revenue sharing is optimal for that particular store.[18] Blockbuster must also pay some studios a minimum payment, or "title guarantee," for each title it acquires, regardless of the rental revenue that particular title generates.[19] Moreover, Blockbuster's revenue-sharing agreements were long-term, ranging from two to five years.[20] Additionally, Blockbuster committed to increasing its advertising and marketing expenditures substantially to promote its increased copy depth under revenue sharing.[21]

At the same time (and in some cases, before) they entered into revenue-sharing agreements with Blockbuster, each studio began offering a variety of copy-depth programs to its customers and also entered into direct revenue-sharing agreements with many retailers and distributors.[22] Indeed, petitioners concede that the conspiracy they allege did not prohibit the studios from

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[17] *See* 37RT3154-55.

[18] *See* 37RT3168-70.

[19] *See* 37RT3171.

[20] *See* 37RT3156-57. Most of the agreements at issue in this case have expired. With the advent of DVDs, which were not covered by Blockbuster's original revenue-sharing agreements, Blockbuster acquires an increasingly smaller percentage of its rental product through revenue-sharing arrangements. Thus, the "new way of doing business" petitioners challenge in this case has itself become nearly obsolete.

[21] *See* 37RT3183-84.

[22] *See* 34RT2154-60; 36RT2782, 2790, 2796-99, 2677; 30RT790-93; PX-309; 35RT2569-70; 31RT959-61, 966-67, 1140, 1178; 32RT1508-10, 1526-27, 1555, 1571, 1583, 1640-42; 33RT1776, 1787, 1793; PX-949; 37RT3025.

giving Blockbuster's most formidable competitors—such as Hollywood Video, Movie Gallery, and other chain video stores—revenue-sharing deals identical to or even better than Blockbuster's deals.

Proceedings Below

Petitioners allege that Blockbuster orchestrated a conspiracy among the studios to deny independent video retailers ("IVRs") the revenue-sharing terms Blockbuster negotiated for itself. Petitioners base their conspiracy claim on circumstantial proof of "consciously parallel conduct against independent self-interest." Pet. at 10. Thus, petitioners acknowledge that there is no direct evidence of conspiracy in this case. *See, e.g.*, Pet. at 29. Moreover, petitioners agree that Blockbuster's revenue-sharing agreements themselves are entirely lawful and procompetitive—that is, good for consumers.[23]

Petitioners assert, however, that respondents unlawfully agreed to deny them these same procompetitive revenue-sharing deals. They claim that the studios acted in consciously parallel fashion by uniformly failing "to agree to revenue sharing on Blockbuster terms with plaintiffs' distributors," although such agreements allegedly would have been in each studio's economic self-interest. Pet. at 9. They also claim that this failure to agree to share revenue with distributors on Blockbuster's terms is against each studio's self-interest and could only reflect conspiratorial conduct because it allegedly had the effect of increasing Blockbuster's market power and driving independents out of business. *See* Pet. at 9-10.

Blockbuster and each studio maintain that the revenue-sharing agreements between them are the result of independent, lawful business negotiations that did not include any discussion of the revenue-sharing terms studios would offer other video retailers, much less an ***agreement*** to deny independent retailers

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[23] *See* 28RT202-203.

revenue-sharing terms equivalent to Blockbuster's terms. Petitioners' case-in-chief at trial included abundant evidence rebutting the allegation that the studios uniformly refused to enter into revenue-sharing agreements with distributors on Blockbuster's terms.[24] Indeed, the evidence demonstrated that each studio offered its customers numerous copy-depth arrangements, including output and "cherry-pick" revenue-sharing deals.[25] The evidence also showed that most independent video retailers and their distributors did not want revenue-sharing terms identical to Blockbuster's,[26] thus rebutting the allegation that a studio's failure to enter into revenue-sharing deals with distributors that were identical to Blockbuster's deals was the result of a conspiracy.

Given the substantial evidence of the unwillingness of petitioners, IVRs, and distributors to agree to the same long-term output obligations as the large chains, the district court and the Fifth Circuit correctly concluded that the evidence,

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[24] *See infra* Part I.B.1. Petitioners chose to call in their case at least one executive from each respondent company, including Sumner Redstone, the Chairman and CEO of Viacom, and John Antioco, the Chairman and CEO of Blockbuster. Thus, all of the "business justification" evidence petitioners cite was presented in their case-in-chief. The district court granted respondents' motion for judgment as a matter of law after the close of petitioners' case.

[25] *See supra* note 22. Petitioners suggest that some studios offered output revenue-sharing terms to distributors only after petitioners filed this lawsuit. *See* Pet. at 9 n.9, 10 n.13. In truth, the evidence shows that studios began negotiating output deals with distributors long before this lawsuit was filed. *See, e.g.*, 35RT2573-74. For example, Fox began negotiating an output revenue-sharing deal with Rentrak at least as early as December 1998, and it took Fox approximately the same amount of time to conclude that deal as it did to conclude its deal with Blockbuster. *See id.*; *see also* DX-4039; DX-4058; DX-4081; 36RT2662-63.

[26] *See infra* Part I.B.1.

taken as a whole, did not tend to exclude the possibility of independent conduct by respondents.[27]

REASONS TO DENY THE WRIT

I. The Fifth Circuit Correctly Applied This Court's Summary Adjudication Standard For Antitrust Conspiracy Claims.

A. This Court's decisions restrict the range of permissible inferences in antitrust cases.

Relying and expanding on *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), this Court set forth in *Matsushita* the standard that lower courts must apply to summary adjudications of antitrust conspiracy claims under Section 1 of the Sherman Act.[28] Observing that general summary judgment principles require courts to view inferences from the evidence in the light most favorable to the nonmovant, the Court nevertheless held that special considerations apply in the antitrust context:

> But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto* . . . , we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. . . . To survive a motion for summary judgment or for a directed

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[27] Petitioners and their counsel are pursuing an identical action in California state court. On February 20, 2003, the California court granted respondents' motion for summary judgment, dismissing in their entirety the identical claims at issue here. Like the lower courts here, the California court found that "[t]aken as a whole, plaintiffs' evidence does not point to conspiracy as more likely than permissible competition."

[28] As the Court points out in its opinion, the principles articulated in *Matsushita* apply equally at the summary judgment and directed verdict (*i.e.*, judgment as a matter of law) stages. *See* 475 U.S. at 588.

> verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. . . . Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Matsushita, 475 U.S. at 588 (citations omitted). The Court explained that these limitations on circumstantial evidence of conspiracy are necessary because "mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 594; *see also Monsanto*, 465 U.S. at 763 (permitting inferences from ambiguous evidence "could deter or penalize perfectly legitimate conduct").

The *Matsushita* standard also applies to petitioners' claim under the Cartwright Act, California's analog to the Sherman Act.[29] In *Aguilar v. Atlantic Richfield Co.*, 24 P.3d 493 (Cal. 2001), the California Supreme Court adopted the *Matsushita* standard for evaluating antitrust conspiracy claims under the Cartwright Act. In that case, the plaintiff, on behalf of herself and all other retail consumers of CARB gasoline, sued numerous petroleum companies for conspiring to fix prices. The defendants moved for summary judgment, presenting declarations from each company "generally stating on personal knowledge how the company made its capacity, production, and pricing decisions about CARB gasoline, asserting that it did so independently, and denying that it did so collusively with any of the others." 24 P.3d at 503. The plaintiff opposed the motion with expert testimony and evidence that the petroleum companies gathered and disseminated pricing and other trade

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[29] Petitioners' only claim for damages in this case arises under the California Cartwright Act, which, unlike the Sherman Act, allows indirect purchasers to sue for damages. Petitioners seek only injunctive relief under the Sherman Act.

information, used common consultants, and executed exchange agreements to trade petroleum products.

Applying the standard set forth in *Matsushita*, the California Supreme Court affirmed summary judgment for the defendants, finding that the plaintiffs had not presented evidence that tended to exclude the possibility of independent conduct. Addressing the plaintiff's attempt to rebut the defendants' evidence of business justification, the *Aguilar* court noted that an antitrust plaintiff "may not make it to trial 'by merely asserting' that a reasonable trier of fact 'might, and legally could, disbelieve' [the defendants'] denial 'without offering any concrete evidence from which' such a trier of fact could find in his favor." 24 P.3d at 508 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986)). The *Aguilar* court explained:

> [E]ven though the court may not weigh the plaintiff's evidence or inferences against the defendants as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*. . . . In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself.

Id. at 514-15 (citations omitted) (emphasis in original).

Petitioners in this case do not challenge the *Matsushita* standard, acknowledging that they cannot rely solely on conduct as consistent with conspiracy as with independent action.[30]

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[30] Petitioners go to great lengths to argue that *Matsushita* does not impose a "special burden" on antitrust plaintiffs. Pet. at 21. But whether or not the *Matsushita* standard is described as "special," this Court was clear that antitrust law restricts the range of permissible inferences at the summary adjudication stage. Thus, while a plaintiff in an ordinary case might be able to survive a motion for judgment as a matter of law by presenting evidence that is equally consistent with its theory of the

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Instead, they challenge the Fifth Circuit's application of that standard in this case. This clearly does not present an issue warranting this Court's review. *See, e.g.*, SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").[31] In any event, the Fifth Circuit correctly applied *Matsushita* to the evidence presented in this case.

B. The Fifth Circuit correctly held that petitioners failed to produce evidence that "tends to exclude the possibility of independent conduct."

As their petition makes plain, petitioners' conspiracy case rests exclusively on their theory of conscious parallelism.[32]

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case as with the defendant's theory of the case, an antitrust plaintiff cannot—he must present evidence that tends to exclude the possibility of independent conduct. Only then can a "reasonable" inference of conspiracy arise to defeat judgment as a matter of law. As the Eleventh Circuit Court of Appeals has put it (in a case petitioners cite), "[e]quipoise is not enough to take the case to the jury." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1310 (11th Cir. 2003).

[31] For the same reason, the Fifth Circuit's ruling affirming judgment as a matter of law on petitioners' Robinson-Patman claims does not merit this Court's attention, because the petition for certiorari on this issue is expressly and solely premised on the argument that the Fifth Circuit simply misapplied the principles of *F.T.C. v. Morton Salt*, 334 U.S. 37 (1948), to the facts of this case. *See* Pet. at 27-29. In any event, it is clear from the Fifth Circuit's opinion that it correctly concluded that petitioners' price discrimination claims are factually and legally unsupportable.

[32] Blockbuster argued below that petitioners' theory that the ***studios*** acted in a parallel fashion contrary to their interests is insufficient to implicate ***Blockbuster*** in the alleged conspiracy. Petitioners claim, however, that Blockbuster is "liable as a participant" in the alleged

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When antitrust claimants lack direct evidence of conspiracy, they may rely on "circumstantial evidence of parallel conduct among the competitors." *Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984). However, to avoid summary judgment or judgment as a matter of law under this theory, "the plaintiff cannot rely on proof of parallel behavior alone; significant probative evidence of conscious parallelism is required, 'with . . . some "plus" factor which tends to indicate that the asserted unilateral behavior was not such in fact. . . .'" *Id.* (quoting *Paul Kadair, Inc. v. Sony Corp. of Am.*, 694 F.2d 1017, 1027 n.27 (5th Cir. 1983)). Although there are others, the most common "plus factor" is evidence that the defendants engaged in conduct "'which was contrary to their economic self-interest so as not to amount to a good faith business judgment.'" *Id.* (citation omitted). Petitioners rely only on this "act against interest" plus factor in this case.

Petitioners claim that the studios acted in a consciously parallel fashion by failing to agree with petitioners' distributors on revenue-sharing terms identical to Blockbuster's terms and that this conduct was against the studios' economic self-interest.[33] Respondents not only challenged this proof but also

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conspiracy because it "organized" and "instigated" it. *See* Pet. at 7. Blockbuster demonstrated below that petitioners presented no evidence from which a reasonable jury could infer that Blockbuster participated in the alleged conspiracy, and the Fifth Circuit agreed, holding that petitioners' evidence that Blockbuster had the motive and opportunity to conspire with the studios was insufficient. *See* Pet. App. at 5-7. As the court of appeals observed, a "company can set ambitious competitive goals for itself, such as 'owning' a portion of the market or significantly increasing its market share, without giving rise to a presumption that it intends to use illegal means to achieve those goals." *Id.* at 5-6.

[33] As respondents argued below, petitioners failed to establish a prima facie case of conscious parallelism. The evidence shows that the studios addressed the video industry's copy depth problem in vastly
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rebutted it with evidence that distributors would not agree to Blockbuster-style revenue sharing. Petitioners do not claim that this evidence of business justification was inadequate to rebut petitioners' prima facie case of conscious parallelism plus acts against interest. Instead, petitioners argue that they presented evidence that contradicted respondents' business explanations—in effect, surrebuttal evidence that "tends to exclude the possibility of independent action."[34] Thus, the narrow question presented to and decided by the Fifth Circuit was whether

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different ways, dispelling any notion that their conduct was uniform. *See supra* note 22. Thus, petitioners are well aware that it is ***not*** "undisputed that the conduct at the heart of this case occurred." Pet. at 11. The Fifth Circuit did not address this argument directly, however, and respondents assume, for purposes of this opposition only, that petitioners presented sufficient evidence of parallel conduct.

[34] Petitioners frame their analysis in terms of shifting burdens, claiming that they presented evidence of consciously parallel conduct against the studios' individual economic interests, which respondents rebutted with evidence of business justification, which petitioners, in turn, rebutted with evidence of "pretext," raising a fact issue for the jury. *See* Pet. at 11-12. However, petitioners' "evidence" that the studios acted against their self-interest is simply the evidence of business justification taken out of context. For example, petitioners cite the testimony of a Universal witness that it would be bad business for Universal to deny Blockbuster's revenue-sharing terms to other retailers and claim that this proves that the studios acted against their interests in denying the Blockbuster terms to distributors. *See* Pet. at 9; Pet. App. at 55. But the Universal testimony, read in context, explains that although Universal would have loved for every retailer to accept Blockbuster's revenue-sharing terms because it viewed revenue sharing as a "tool in resurrecting the industry," many independent retailers would not accept the Blockbuster terms because of onerous obligations like payment guarantees and output requirements. *See* 31RT1151-55. Because petitioners' evidence of "acts against interest," put in context, actually establishes that the studios' actions were explained by the fact that many, if not most, independent video retailers would not accept the burdens of Blockbuster-style revenue-sharing, petitioners arguably never raised an issue of fact on "acts against interest" in the first place.

petitioners' evidence tended to exclude the possibility that defendants acted independently. This question did not raise any unsettled issue of law; it merely required the court of appeals to apply this Court's well-settled *Matsushita* standard. The Fifth Circuit correctly did so.

1. The evidence of "business justification"

The record at trial contained ample evidence that when a studio failed to reach revenue-sharing agreements with distributors on terms identical to Blockbuster's, that failure was the result of the unwillingness of distributors and their customers, IVRs, to accept those terms. Contrary to petitioners' contention, the record contains much more than respondents' "self-serving testimony" that IVRs and distributors would not do Blockbuster-style revenue sharing. For example, David Ingram, the only distributor petitioners called to testify at trial, testified that a large percentage of independent retailers simply would not embrace output revenue sharing.[35] Other distributors were openly hostile to revenue sharing, with one describing it as "the ball-and-chain your [video] business doesn't need."[36] Moreover, petitioners themselves testified that they never asked their distributors for output revenue sharing.[37]

All of this testimony was consistent with the evidence that the studios' efforts to interest distributors and IVRs in revenue-sharing deals on Blockbuster's terms were consistently rebuffed. Several studios contacted IVRs directly to determine whether there was any interest in output terms, but got cold receptions.[38] For example, upon finalizing its Blockbuster deal, Universal proposed the same terms to many of the next 100 largest

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[35] *See* 34RT2062, 2078, 2080-84.

[36] *See* 32RT1306-07.

[37] *See* 30RT720; 31RT1226-27.

[38] *See* 31RT1148-52; 32RT1555; 34RT2157-58.

retailers.[39] Almost without exception, smaller retailers declined to participate because of output and minimum guarantee requirements.[40] Several studios even offered direct output revenue-sharing arrangements to two of the petitioners.[41] But these two petitioners (and the group representing them) never responded to the studios' offers.[42]

The studios also offered long-term output revenue sharing to distributors servicing IVRs, but relatively few IVRs (and therefore few distributors) wanted deals containing the same guarantees and fees as those negotiated by large chains.[43]

The reasons for the IVRs' reluctance (and therefore the distributors' reluctance) were numerous. Revenue sharing requires sophisticated computer equipment to report rental transactions electronically to the studios; solid credit because payments are made over time, not COD; large amounts of inventory space to accommodate multiple copies of every movie released by each studio; and increased capital because successful revenue sharing requires increased rental transaction volume, which requires additional advertising and other spending.[44] Due in part to these requirements, Blockbuster's cost-of-goods using output revenue-sharing increased by 33% over its pre-revenue sharing costs (from 30% to over 40%).[45]

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[39] *See* 31RT1148-52; DX-8031.

[40] *See* 30RT821, 864-67; 31RT957-58, 1148-52.

[41] *See* 30RT666; 32RT1651; 33RT1806, 1857-58; 34RT2220-21; 36RT2627, 2661-62.

[42] *See* 30RT670; 33RT1879-81; 36RT2677-78.

[43] *See* 31RT957-58, 1099-1104, 1148-52, 1125-26; 32RT1306-07, 1555; 34RT2157-58; 36RT2796-97, 2800.

[44] *See* 34RT2070-72; 31RT1176; 32RT1556-57; 34RT2025; 29RT329-30, 391-92; 37RT3183-84.

[45] *See* 37RT3041.

All of this evidence demonstrated that distributors and IVRs were largely unwilling to accept Blockbuster's revenue-sharing terms, fully justifying as independent, legitimate business conduct those instances where a studio failed to enter into a Blockbuster-style revenue-sharing agreement with petitioners' distributors.

2. Petitioners' so-called "controverting" evidence

Petitioners claim that they presented evidence that the two largest video distributors "actively sought the same terms made available to Blockbuster," which, according to petitioners, contradicts the evidence that the studios' conduct was justified by independent legitimate business reasons.[46] This evidence, however, not only fails to contradict the evidence of business justification, it actually confirms that distributors and IVRs were unwilling to accept Blockbuster's revenue-sharing terms. Thus, petitioners did not present evidence tending to exclude the possibility that respondents acted independently.

Petitioners focus primarily on letters David Ingram sent to studios complaining about the studios' direct relationships with large chains and the effect those agreements were having on Ingram and his customers, and expressing Ingram's interest in

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[46] Plaintiffs repeatedly use the word "direct" in describing the evidence they claim contradicted respondents' business justifications. For example, they claim that "the plaintiffs specifically controverted this contention by *direct* evidence that distributors and independent retailers requested and could do Blockbuster-comparable output revenue sharing." Pet. at 10 (emphasis in original). Whatever petitioners hope to accomplish by emphasizing the term "direct," it does not change the fact that they offered only ***circumstantial*** proof of conspiracy, as petitioners themselves acknowledge. Evidence that distributors asked for Blockbuster's revenue-sharing deals, even if true, is obviously not direct evidence that respondents conspired not to give them those deals. *See, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) ("Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.").

securing terms that would enable independents to compete better. Petitioners portray these letters as "repeated requests" for output terms that were ignored by the studios.[47]

On their face, these letters do not contain a request for revenue-sharing deals at all. Instead, they merely reflect Ingram's displeasure with Blockbuster-style revenue-sharing deals and the impact they were having on his company and his customers. Moreover, petitioners fail to point out that they examined Ingram for hours, and never asked him the crucial question: "Did any studio refuse to negotiate output revenue sharing with you?" Defendants did ask Ingram whether he had any evidence that the studios conspired to deny distributors (including Ingram) output revenue sharing. Ingram unequivocally said he did not, and doubted that such a conspiracy could or would take place.[48]

Moreover, Ingram did negotiate revenue-sharing deals with some of the studios. Warner, for example, chose Ingram to be its exclusive distributor for output revenue sharing on terms identical to the Warner-Blockbuster agreement.[49] Far from being conspired against, Ingram testified that he was "encouraged by the studios to offer revenue sharing to [Ingram's] customer base."[50] The problem was that revenue sharing proved to be too burdensome for Ingram and his customers. It took Ingram over $1 million and two-and-a-

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[47] The district court held that all the Ingram documents (PX-65, 388, 374-76) were inadmissible as hearsay and could not support petitioners' conspiracy theory. *See* 30RT876-80; 31RT1095-97; 33RT1905-06, 1911-15; 34RT2005-07. Petitioners did not appeal these rulings and therefore are not entitled to rely on this evidence. Nevertheless, even if admissible, these documents do not tend to exclude the possibility of independent conduct by the studios.

[48] *See* 34RT2053-55.

[49] *See* 34RT2021; DX-379.

[50] *See* 33RT1959.

half years (to mid-2000) to set up 1000 stores (out of more than 20,000) to do revenue sharing.[51]

The Rentrak-Fox letters likewise do not "tend to exclude" independent conduct. Rather, this correspondence, beginning in August 1998, was part of the Fox-Rentrak negotiation of an output revenue-sharing agreement, which was completed during a length of time comparable to that for the Blockbuster-Fox agreement.[52] Aside from proving that Fox was willing to, and did, enter into output revenue sharing with Rentrak, these letters illustrate nothing about any other studio's dealings with Rentrak. For example, MGM also entered an output agreement with Rentrak, and did so on terms more favorable than the MGM-Blockbuster terms.[53]

3. The Fifth Circuit's decision

After reviewing all of the evidence in the record, including the Ingram and Rentrak evidence, the Fifth Circuit concluded that petitioners failed to present evidence that tended to exclude the possibility that respondents acted independently.[54] In other words, the court of appeals decided, after reviewing the record, that petitioners had presented insufficient evidence to create a ***reasonable*** inference of conspiracy. Considering what petitioners' "controverting" evidence actually says (as opposed to their spin on it), the district court and the court of appeals

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[51] *See* 34RT2060, 2069-70, 2072.

[52] *See* DX-4039; DX-4058, DX-4081; 35RT2573-74; 36RT2662-63.

[53] *See* 37RT3005, 3043-45.

[54] As petitioners point out, it must be assumed that the court of appeals reviewed all of the evidence in the record, as it is required to do in reviewing a judgment as a matter of law. *See* Pet. at 14. The fact that the Fifth Circuit did not specifically discuss each piece of evidence proves nothing. *See In re Baby Food Antitrust Litig.*, 166 F.3d at 131 ("The District Court may not have specifically addressed this testimony but that does not mean the court ignored it.").

could have reached no other result, because the Ingram and Rentrak evidence is entirely consistent with, not contradictory to, the wealth of additional evidence, including the studios' testimony, that each studio acted according to its own independent business judgments.

The Fifth Circuit's decision is in accord with this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). Petitioners erroneously claim that *Eastman Kodak* establishes a "rule" that evidence of business justification creates a factual question for the jury to evaluate. Pet. at 3. The passage on which petitioners rely merely held that factual questions existed ***in that case*** about the validity of the defendant's claimed business justifications. *See* 504 U.S. at 483. As the Court explained at length, because Kodak's business justifications were inconsistent with its own theories and its own conduct, none of them was "sufficient" to prove that Kodak was entitled to summary judgment.[55] 504 U.S. at 485-86. Thus, the Court did not hold that business justifications always create a fact issue on conspiracy—it merely held that the business justifications at issue in the case before it did so.

The Fifth Circuit's decision is also entirely consistent with this Court's JMOL standard in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Petitioners claim that the Fifth Circuit violated *Reeves* by treating evidence of business justification as "dispositive" and ignoring evidence of alleged "pretext." Pet. at 14-15. *Reeves* was an employment discrimination case involving the burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

[55] Unlike this case, the record in *Eastman Kodak* was severely underdeveloped because Kodak filed its motion for summary judgment before any discovery had taken place, and the district court granted the motion without a hearing after allowing the plaintiffs only one set of interrogatories, one set of requests for production of documents, and six depositions. 504 U.S. at 459. As the Court noted, Kodak's arguments might have turned out to be correct, but the Court was unable to reach that conclusion on "a record this sparse." *Id.* at 486.

(1973), and therefore did not implicate the limits on permissible inferences that *Matsushita* applies to antitrust conspiracy cases. Moreover, as the Court recognized in *Reeves*, evidence of pretext will not always be adequate to defeat judgment as a matter of law:

> Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law . . . if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves, 530 U.S. at 148. Here, consistent with *Reeves*, the Fifth Circuit reviewed all of the evidence in the record and reached the unremarkable conclusion that petitioners' so-called "pretext" evidence was inadequate to defeat judgment as a matter of law.

The court of appeals did not have to create a "new standard" to reach this result because *Matsushita* compels it.[56] Petitioners

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[56] If the Fifth Circuit intended to create a "new standard" of giving "dispositive" weight to evidence of business justification, as petitioners imagine, Pet. at 24-25, one would have expected the court to at least hint that it was doing so. But the word "dispositive" does not appear in the Fifth Circuit's opinion. Nor does the opinion even remotely suggest that the court of appeals viewed its decision as expanding or departing from *Matsushita*. To the contrary, the Fifth Circuit articulated the correct standard from *Matsushita* and then relied on that standard in assessing the evidence in this case.

Tellingly, the Fifth Circuit determined that its opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4. According to 5TH CIR. R. 47.5.1, an opinion

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simply disagree with the Fifth Circuit's view of the evidence and have therefore set up the strawman of a "new restrictive legal standard" in an effort to have this Court arbitrate that disagreement.

II. There Is No Conflict Among The Circuits Regarding Summary Adjudication Of Antitrust Conspiracy Claims Based On Circumstantial Evidence.

Relying on their erroneous characterization of the Fifth Circuit's decision as giving "dispositive" weight to evidence of business justification, petitioners assert that the Fifth Circuit's decision conflicts with decisions of the Third, Sixth, Eleventh, and Seventh Circuits. According to petitioners, these circuits hold that evidence of business justification "is just another piece of evidence for the jury to consider." Pet. at 22.[57] Petitioners in effect argue that evidence of business justification can never defeat a plaintiff's prima facie case of conscious parallelism and "plus factors" at the summary judgment or judgment as a matter of law stage.

None of the cases petitioners cite supports their argument, and numerous other cases from these circuits demonstrate that there is no conflict among the circuits on the standard for summary adjudication of antitrust conspiracy claims. All of the

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should not be published if it "merely decide[s] [a] particular case[] on the basis of well-settled principles of law," but it should be published if it:

> [e]stablishes a new rule of law, alters, or modifies an existing rule of law . . . ; [a]pplies an established rule of law to facts significantly different from those in previous published opinions applying the rule; . . . [or] [c]reates or resolves a conflict of authority either within the circuit or between this circuit and another.

[57] Petitioners erroneously claim that *Eastman Kodak* supports this rule. *See supra* note 55 and accompanying text.

courts of appeals apply the same standard—the *Matsushita* standard—but, as one would expect, the courts reach different results when the standard is applied to the particular facts of each case. We address each of the allegedly conflicting circuits in turn.

Third Circuit. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993), does not hold that evidence of business justification always creates a factual issue for the jury to decide. Rather, the Third Circuit held that defendants' proferred business justification "[made] no sense" and was therefore insufficient to rebut plaintiffs' evidence of conscious parallelism and acts against interest. *Id.* at 1244-45. Moreover, the Third Circuit held that it would permit "more liberal inferences from the evidence" than *Matsushita* allowed because the challenged conduct was not procompetitive. *Id.* at 1232. Petitioners have not suggested that more liberal inferences should be allowed in this case.

Consistent with the Fifth Circuit's decision in this case, the Third Circuit has affirmed summary judgment in cases where defendants presented evidence of business justification and plaintiffs failed to produce evidence tending to exclude the possibility of independent conduct raised by defendants' explanations. *See, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 138 (3d Cir. 1999) (affirming summary judgment where defendants produced "evidence that [they] engaged in unilateral, aggressive competition," and plaintiffs failed to produce "sufficient circumstantial evidence to prove concerted collusion that tends to exclude the possibility of independent action"); *see also InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144 (3d Cir. 2003) (affirming summary judgment for defendant where plaintiff's attempt to rebut evidence that defendant acted unilaterally was "unavailing").

Sixth Circuit. *Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), likewise fails to support petitioners' position. In that case, the Sixth Circuit rejected the

defendant's business justifications "as a matter of logic and law . . . because no reasonable jury could believe them." *Id.* at 1015-16. Obviously, without any credible evidence of business justification to rebut the plaintiff's "circumstantial evidence that [the challenged conduct] would not have been in either defendant's *independent* economic interest . . . [and] other circumstantial evidence of conspiratorial conduct," the defendant was not entitled to summary judgment. *Id.* at 1009 (emphasis in original).

Seventh Circuit. Petitioners cite *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997), to support their assertion that evidence of business justification simply creates a fact issue for the jury, but, as the passage petitioners quote explains, the Seventh Circuit was not addressing in that case ambiguous circumstantial evidence rebutted by evidence of business justification. It was dealing with "smoking gun" evidence consisting of "a number of instances in which officers of the defendant wholesalers urge manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledge to adhere to the chargeback system." *Id.* at 614. The Seventh Circuit understandably held that defendants' "innocent interpretations" of this "smoking gun" evidence were not enough to sustain a summary judgment in their favor. Of course, as the Fifth Circuit recognized and petitioners do not dispute, there is nothing remotely resembling a "smoking gun" in this case and the record contains positive evidence of business justifications for respondents' conduct, not merely "innocent interpretations" of petitioners' evidence. *In re Brand Name* is simply inapposite.

Furthermore, other cases from the Seventh Circuit are entirely consistent with the Fifth Circuit's approach in this case. In fact, the Seventh Circuit follows a burden-shifting interpretation of *Matsushita* that ***requires*** summary judgment to be granted for defendants if they provide evidence of business justification and the plaintiff fails to present evidence that "tends

to exclude the possibility that defendants were pursuing their legitimate independent interests." *See Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 49 (7th Cir. 1992) (affirming summary judgment where defendants presented evidence of business justification and plaintiffs failed to produce evidence that tended to exclude the possibility of independent conduct); *see also Serfecz v. Jewel Food Stores*, 67 F.3d 591 (7th Cir. 1995); *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167 (7th Cir. 1990).

Eleventh Circuit. Finally, the Eleventh Circuit's decisions confirm that the Fifth Circuit correctly decided this case. Petitioners cite *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548 (11th Cir. 1998), and disingenuously quote the Eleventh Circuit's holding that evidence of conscious parallelism plus acts against self-interest were sufficient to defeat summary judgment. Petitioners neglect to mention that defendants apparently presented ***no*** evidence of business justification in that case. *See* 158 F.3d at 568. Like *In re Brand Name*, *City of Tuscaloosa* is therefore irrelevant to the question petitioners present for review in this Court.

Astonishingly, petitioners also cite *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003), to support their contention that "most circuits" treat "evidence of business justification or other innocent explanation [as] just another piece of evidence for the jury to consider." Pet. at 22. In fact, the Eleventh Circuit rejected nearly all of the arguments petitioners make here and affirmed summary judgment for defendants based on the evidence of business justification.

In *Williamson*, cigarette wholesalers alleged that tobacco companies conspired to fix cigarette prices. The wholesalers offered evidence of parallel pricing behavior and evidence of various "plus factors." Noting that consciously parallel conduct coupled with plus factors could create an inference of conspiracy, the Eleventh Circuit held that "defendants may rebut the inference of collusion by presenting evidence establishing that

no reasonable factfinder could conclude that they entered into a price fixing conspiracy." 346 F.3d at 1301 (citations omitted). Based on this standard, the Eleventh Circuit affirmed summary judgment for the defendants, holding that "even had appellants demonstrated the existence of one or more plus factors . . . the manufacturers would have readily rebutted the resulting inference of collusion." *See id.* at 1321.

In reaching its decision, the Eleventh Circuit rejected the very arguments that petitioners assert here—namely, that "the district court required it to exclude all 'innocent' explanations for appellees' conduct in order to survive summary judgment;" that "the district court's imposition of a 'tends to exclude the possibility that the alleged conspirators acted independently' standard contradicted *Eastman Kodak* because it imposed a 'special burden' on antitrust plaintiffs;" and "that the district court improperly substituted its assessment of the evidence for that of the jury." *Williamson*, 346 F.3d at 1302, 1304. In rejecting these arguments, the Eleventh Circuit defended the lower court's decision with language that applies equally well to the Fifth Circuit's decision in this case:

> [The court] merely ascertained, as it was required to do under *Matsushita* and *Harcros*, whether appellants' evidence tended to exclude the possibility of independent action. It made no finding as to whether such independent action did or did not exist. ***Although it did make determinations as to the reasonableness of the inferences that could be drawn from the evidence, these were threshold legal determinations that appropriately were made by the district court.***

Id. at 1304 (emphasis added). As this passage makes clear, the Eleventh Circuit's decision in *Williamson* could not be more consistent with the Fifth Circuit's decision in this case. *See also Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991).

The circuit conflict petitioners imagine simply does not exist.

CONCLUSION

The petition for writ of certiorari should be denied. In affirming judgment as a matter of law for respondents, the Fifth Circuit applied this Court's well-settled standard for summary adjudication of antitrust conspiracy claims based on circumstantial evidence. The Fifth Circuit did not decide any unsettled issue of law, did not create any new legal standard, and did not issue an opinion that conflicts with a decision of any other court of appeals.

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